COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

RE: COMPETITIVE MARKET INITIATIVES **DTE 01-54**

Additional Comments of the Massachusetts Union of Public Housing Tenants and National Consumer Law Center[1]

January 4. 2002

I. Introduction

The National Consumer Law Center ("NCLC"), on behalf of and in conjunction with the Massachusetts Union of Public Housing Tenants ("MUPHT"), offers these additional comments in response to the Department's December 11, 2001 Memorandum in DTE 01-54 (Phase II) . In that memorandum, the Department invited interested parties to comment on a range of issues, including:

1. Should electric distribution companies perform the role of electricity brokers for their default service customers, and, if so, how?

2. Should customer account numbers be included on the Customer Information Lists provided to competitive suppliers, and should the first four characters of a customer's account name continue to be required for a successful enrollment of the customer?

3. Should the Customer Information Lists be expanded to include information about customer delivery points, and also information about customers who receive generation service from competitive suppliers?

4. Should distribution companies use the Internet for the transmission of customer data between the companies and competitive suppliers?

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[1] The Low-Income Energy Affordability Network ("LEAN"), which has not previously been involved in this docket, also supports and joins in these comments. LEAN is the "low-income weatherization and fuel assistance program network" alluded to in G.L. c. 25, §19

5. What technical processes and consumer protections are necessary to implement the use of electronic signatures consistent with the requirements of the Restructuring Act?

As to the first four questions, NCLC and MUPHT (hereafter, "NCLC") reserve the right to file reply comments by January 14, as allowed in the schedule. NCLC wishes to review the proposals that the electric distribution companies ("EDCs") and competitive suppliers will make regarding the brokering function, the contents of Customer Information Lists, and release of information, before it files comments on these topics. While some parties have offered tentative positions on these issues at the technical conference on November 14, it is not yet clear what the EDCs and competitive suppliers will seek.

NCLC, however, appreciates the opportunity to offer additional comments regarding the use of electronic signatures to switch or enroll customers, to obtain permission to release information, or to otherwise conduct the business of competitive electric supply. NCLC previously submitted extensive comments on these issues, in initial comments filed August 10, 2001 and in reply comments filed August 17, 2001. In light of the Department's opinion issued October 15, 2001, NCLC offers these additional comments.

II. Companies That Wish to Solicit and Rely upon Electronic Signatures, as They Are Allowed to Under the Electronic Signatures in Global and National Commerce Act ("E-sign"), 15 USC §§7001 *et seq.*, Must Comply with the Provisions of That Law.

In its initial and reply comments filed last August, NCLC clearly stated that "electronic signatures cannot be denied legal effect as a matter of federal law." Thus, unlike many other parties

who asserted that the state of the law was ambiguous,[2] NCLC acknowledged that companies can use electronic signatures to conduct their business.

But NCLC reiterates that companies are not free to solicit and accept electronic signatures unhindered by any legal restrictions. As the Department already concluded, there is not any fundamental and "necessary conflict between federal and state law," and the key questions before the Department are not the "preemption and alleged unconstitutionality" of the relevant state law, G.L. c. 164. DTE 01-54-A (October 15, 2001), at 36-37. Rather, the task facing the Department is how to "develop the rules necessary to implement the complex requirements of the E-Sign Act," *id.* at 30 (summarizing comments of NCLC). The Department has designated this current phase of the proceeding, *inter alia*, for "development of the technical processes and consumer protections necessary to implement the use of electronic signatures." *Id.* at 37. To develop those technical processes and consumer protections, the Department must look to the specific requirements of E-Sign.[3]

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[2] The distribution companies commented that the Restructuring Act, St. 1997, c. 164, does not allow for the use of electronic signatures to enroll customers, a point with which NCLC agrees, but offered no opinion on whether E-sign preempts state law, to the extent it may be contradictory. *See, e.g.*, Comments of NSTAR Electric, at 15, n.11 (E-sign *may* "have the effect of preempting contradictory state law," but no opinion offered); WMECO Comments, at 17-18 ("It may be that the E-Sign Act preempts the state statutory language," but the Department should conduct further investigation of this issue); MECO Comments, at 6.

[3] If, as the Department concluded, there is no fundamental conflict between E-Sign and the Restructuring Act, the Department still faces the task of harmonizing the fairly clear and detailed provisions of E-Sign with the Restructuring Act, which simply did not contemplate the use of electronic signatures. *See, e.g., PMP Associates, Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 595 (1975)(State court turns to interpretation of comparable Federal Trade Commission Act by federal agency and federal courts in interpreting provision of G.L. 93A that is not clearly defined.)

III. The Rights of Consumers Are Clearly Specified in E-Sign and Should be Explicitly Protected by the Department.

NCLC has already offered detailed comments on the requirements of E-Sign and the protections that law offers consumers. NCLC Initial Comments, at 6-13. In addition to referring the Department to those earlier comments, NCLC summarizes some of the key requirements of E-Sign below.

A. Consumers Cannot Be Required to Conduct Business Electronically

Under 15 USC §7001(b)(2), a consumer cannot be required to conduct business electronically. The Department should adopt implementing rules that require competitive suppliers licensed by the Department to offer consumers the option of conducting transactions using ink signatures, paper documents and regular mail.[4] In addition to protecting the rights of consumers, this would also allow consumers who do not have Internet access or who are uncomfortable with their computer skills to participate in the still-nascent competitive marketplace in Massachusetts.

B. The Consumer Must Consent to Do Business Electronically in a Specified Manner and Must Be Granted Specified Rights

At the present time, competitive suppliers and their customers are required to conduct business

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[4] The Department is allowed to adopt implementing regulations that are not inconsistent with E-Sign. 15 USC §7002(a)(2)(A)("A State . . . regulation . . . may modify, limit or supersede the provisions of section 101 [15 USC §7001] with respect to state law only if such . . . regulation . . . specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures . . .[and] if such alterative procedures or requirements are consistent with this title and title II.") A regulation protecting the right of consumers not to be forced into dealing with a supplier electronically would be consistent with E-Sign. However, the state regulations must specifically reference E-Sign. 15 USC §7001(a)(2)(B).

in writing, in terms of initiation of service, rendering bills and termination notices, and various disclosures. The Department's own rules do not allow for electronic transactions and require written documents. *See, e.g.*,, 220 CMR §11.02 (defining "Bill" as a "*written* statement from a Distribution Company or a Competitive Supplier); §11.05(3)(a) (governing the rendering of a "Bill for Generation Service"); §11.05(3)(f)(specifying that termination notices must "be in *writing*, addressed to the customer's billing address, and *mailed first class*"); §11.05(4)(c)(requiring a "Letter of Authorization" that is an "*easily separable document . . signed and dated by the Customer*," prior to initiating service); §11.06(4)(a) (regarding "*written* confirmation by the Competitive Supplier of the Retail Customer's agreement to take Generation Service"); §11.06(5)(requiring that a Competitive Supplier "annually *mail* this [information] booklet to their Retail Customers").[5]

While E-Sign, in 15 USC §7001(a), mandates that "a signature, contract, or other record . . . may not be denied legal effect, validity, or enforcement solely because it is in electronic form," competitive suppliers are not free to substitute electronic signatures and documents wherever ink signatures or paper records are now required. At the heart of E-Sign is the requirement that the consumer must voluntarily consent to the use of electronic records where paper documents were previously required. 15 USC §7001(c)(1). That consent must be done "in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to

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[5] The Attorney General's rules are even more explicit about the need to conduct certain transactions in writing. The information described in 940 CMR 19.05(3), regarding the supplier's identifying information, pricing information, and the nature of standard offer service, must be conveyed "*in writing, no less than ten point type . . . in print that contrast clearly with the material on which it is printed.*"

provide the information that is the subject of the consent." 15 USC §7001(c)(1)(C). NCLC refers the Department to its Initial Comments, at 7 - 13, as to why this provision is so crucial. The Department must develop rules under which consumers would in fact "demonstrate" that "they can access information in the electronic form that will be used to provide the information that is the subject of the consent," before the competitive supplier would be allowed to conduct business electronically. This is a particular concern for lower-income consumers who are less likely to have easy, routine access to the Internet and who are less likely to have computers that download and store records in the range of formats that suppliers may use.

The Department should also carefully consider what would qualify as an "electronic signature" for purposes of initiating service with a competitive supplier. Under E-Sign, an "electronic signature" is:

> an electric sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.

15 USC §7006(5). This definition is both broad, allowing for any "sound, symbol, or process" to be used, and vague in terms of how a consumer would actually effectuate the signature. Before allowing competitive suppliers to use electronic signatures, the Department should require those suppliers to submit proposals for how they intend to sign up customers electronically. The Department should then allow interested parties, including all parties in this docket, to submit further comments regarding whether the actual methods proposed comply with the requirements of E-Sign. The Department is not yet in a position to determine that the methods suppliers might choose to use in fact will comply with E-Sign.

The Department should keep in mind a number of problems that will inevitably arise for

consumers if electronic signatures and electronic records replace ink signatures and paper records. In terms of signing, a consumer who signs his or his name in ink to a paper document understands that the act of signing normally creates binding obligations on the part of the signer. The consumer almost always has an easy ability to obtain a copy of the actual document signed and keep that copy for future reference. Short of forgery, there is usually little dispute over whether the consumer actually signed. By contrast, a consumer who "signs" an agreement on a computer may not fully recognize the legal significance of doing so; may not realize that checking a box with the cursor or hitting the "enter" key at a particular time even constituted a "signature," and may not print (or be able to print) the screen on which the electric signature was effectuated. Should disputes arise, the Department may have to decide if the consumer, or some person, actually effectuated the signature. The Department must develop reasonable rules to protect consumers from being bound by agreements that they did not fully intend to sign and to protect against fraudulent signatures and slamming. The Department must also make sure that consumers can easily retain a copy of the agreements to which they will be bound.

Similar problems arise in terms of electronic records, whether they be billing records or other records regarding electric service. Suppliers that wish to obtain signatures for purposes of enrolling customers will no doubt want to send bills, required notices and other records electronically. The Department has the unquestioned authority to "specify performance standards to ensure the accuracy, record integrity, and accessibility of records that are required to be retained." 15 USC §7004(b)(3). It should exercise this authority and adopt regulations that will: (i) ensure that consumers have reasonable access (including in an electronic format that the particular consumer can download, open or

otherwise access) to any and all records that were previously accessible in paper format (bills, notices, etc.)[6]; (ii) ensure that records that are not kept in paper format are kept in a "locked" or other format that precludes electronic alteration after the fact; (iii) ensure that electronic records are stored in a manner that guarantees the stability and accuracy over time of the information contained in those records.

While the competitive suppliers and other parties in this proceeding advocate the use of electronic signatures and electronic records, the Department does not yet have before it any concrete proposal which can then be evaluated against the requirements of E-Sign and the needs of the consuming public to be protected against unfair, illegal or deceptive practices. NCLC strongly urges the Department to require the filing of detailed proposals that would explain what acts or processes on the part of a consumer would be considered an "electronic signature;" which subsequent bills, notices, or documents the company would then intend to send electronically; how those electronic records would be stored and protected; and how consumers would be provided electronic copies or access to all relevant documents. Parties should be allowed to respond to these proposals.

IV. CONCLUSION

MUPHT and NCLC appreciate the opportunity to file these additional comments (which are supported and joined in by LEAN[7]) and reserve their right to file reply comments by January 14, 2002.

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[6] E-Sign does not allow a Competitive Supplier to send termination notices electronically, if paper notices are required by regulation. 15 USC §7003(b)(2).

[7] See footnote 1.

Respectfully submitted,

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